

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
Glenn Shankle, *Executive Director*



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2007 APR -2 PM 4:27

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

*Protecting Texas by Reducing and Preventing Pollution*

April 2, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **BEXAR METROPOLITAN WATER DISTRICT**  
**TCEQ DOCKET NO. 2006-1833-DIS**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure



2007 APR -2 PM 4: 27

CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2006-1833-DIS

APPLICATION BY BEXAR	§	BEFORE THE TEXAS
METROPOLITAN WATER DISTRICT	§	COMMISSION ON
FOR AUTHORITY TO LEVY	§	ENVIRONMENTAL
IMPACT FEES	§	QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUESTS FOR HEARING**

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to requests for Hearing concerning the above-referenced matter.

**I. Background**

On May 1, 2006, Bexar Metropolitan Water District (Bexar Met or Applicant) filed an application with the TCEQ for authority to levy impact fees of \$2,556 per equivalent dwelling unit for new connections to the water systems within or near all of the service areas of Bexar Met. This application is filed under the authority of Chapter 395 of the Local Government Code, 30 Texas Administrative Code (TAC) Chapter 293 and the procedural rules of the TCEQ. The purpose of the impact fee is to generate revenue to recover the costs of capital improvements and facility expansions made necessary by and attributable to serving new development in the Applicant's area.

Pursuant to 30 TAC § 293.173(a), the Executive Director (ED) notified the Chief Clerk of the TCEQ that the application was administratively complete on May 2, 2006. The notice of Bexar Met's application for an impact fee was published September 3 & 10, 2006 in the *San*

*Antonio Express News*, a newspaper generally circulated in Bexar County, Texas. In addition, the Applicant provided an "Affidavit of Mailed Notice for Impact Fee Application," in which Bexar Met states it mailed the notice on September 11, 2006.

In response to the notices, the TCEQ received requests for a contested case hearing from the following: R.D. Bilbrey; Roy J. Brown; Jeff Buell and Frank J. Sitterle from Sitterle Homes; John J. Carlton representing Standard Pacific Homes of Texas, L.P.; Julian & Rhonda Childs; Mark & Wendy Dickey, Martha Eurey and Sue Wilson; Ronald J. Freeman representing Bitterblue, Inc.; G.G. Gale, Jr., Vice President of Timberwood Development Company; Guadalupe Gonzales; Denise Ingledue; Dianne & Ken Joaquin; Monte B. Lloyd; Martha Mangum, Executive Director of the Real Estate Council of San Antonio; Dan Markson, Vice President of Development of NRP; Mark & Sylvia Mennel; Becky Oliver, Executive Director, and Kim Kapavik Shrum, Government Affairs Director of the Greater San Antonio Builders Association; Pauline I. Perry; Gene Powell; and Jenny & Su Yim. In evaluating the hearing requests, OPIC will break them down into three groups (Group A, Group B and Group C). OPIC recommends referring the hearing requests in Group A to SOAH for a contested case hearing. OPIC recommends denying the hearing requests in Groups B and C.

## **II. Requirements of Applicable Law**

This application, which was filed pursuant to Chapter 395 of the Local Government Code and 30 TAC Chapter 293, was declared administratively complete on May 2, 2006. Therefore, the hearing request associated with this application is evaluated under Subchapter G of Chapter 55 of the Commission's rules.

Under 30 TAC § 55.251, a hearing request must substantially comply with the following:

- (1) Give the name, address, and daytime telephone number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.

In order to grant an individual's request for a contested case hearing, the Commission must find that the request is made in writing and by an affected person. 30 TAC § 55.251(b).

An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.256(a). This justiciable interest does not include an interest common to the general public. *Id.* Section

55.256(c) of 30 TAC provides relevant factors that will be considered in determining whether or not a person is affected. These factors include, but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Section 55.256(b) of 30 TAC provides that, "Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons."

### **III. Affected Person Analysis**

According to 30 TAC § 293.171(1), an impact fee is a charge or assessment imposed by a district against new development in order to generate revenue for funding the costs of capital improvements or facility expansions necessitated by and attributable to such new development. "Capital improvements" means water supply, treatment and distribution facilities, wastewater collection and treatment facilities, stormwater, and drainage, and flood control facilities, including facility expansions, whether or not located within that service area, with a life expectancy of three or more years, owned and operated by or on behalf of a district with authorization to finance and construct such facilities, but such term does not include materials and devices for making connections to or measuring services provided by such facilities to district customers.<sup>1</sup>

The criteria for determining who is entitled to a contested case hearing in this matter is straightforward: those entities who would be subject to paying the impact fee are affected persons. OPIC believes that those who requested a hearing in this matter most likely think they are going to have to pay the impact fee; however, if they will not have to pay the fee, then their interest becomes one that is common to the general public. OPIC has made inferences from the contents of the hearing requests to determine who is most likely subject to the impact fee. OPIC has broken down the hearing requests into three groups: (1) those most likely who are subject to the impact fee and, therefore, are affected persons entitled to a contested case hearing; (2) those who may be subject to the impact fee but have not provided sufficient information for OPIC to make a conclusive recommendation; and (3) those who based on the information provided are

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<sup>1</sup> 30 TAC § 293.171(3)

most likely not subject to the impact fee.

**A. Group Most Likely Subject to the Impact Fee**

1. Sitterle Homes.
2. Standard Pacific Homes of Texas, L.P.
3. Bitterblue, Inc.
4. NRP

The above entities in Group A have represented they are developers who build new homes in the Bexar Met service area or who have contracts for construction projects in the Applicant's area. OPIC would anticipate that these entities are subject to the proposed impact fee and are therefore affected persons entitled to a contested case hearing. If Bexar Met provides evidence and representations that any of all of these entities would not have to pay the impact fee, OPIC would reconsider its recommendation.

**B. Group that May Be Subject to the Impact Fee**

1. Real Estate Council of San Antonio
2. Greater San Antonio Builders Association

The above entities in Group B are associations that may be entitled to a contested case hearing. An association may request a contested case hearing only if the group or association meets all of the following requirements: (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group or association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of the individual members in the case.

Both associations suggest they have members who would be subject to the impact fee. If in fact either of these entities has at least one member who would have to pay the impact fee,

OPIC would agree they are affected persons entitled to a contested case hearing. However, neither of these entities has specifically identified such a member. Therefore, at this time, OPIC cannot recommend that the entities in Group B are affected persons entitled to a contested case hearing. If either group provides the name of at least one specific member who will have to pay the impact fee, OPIC would reconsider its recommendation.

**C. Group Most Likely Not Subject to the Impact Fee**

1. R.D. Billbrey
2. Roy J. Brown
3. Julian and Rhonda Childs
4. Mark and Wendy Dickey, Martha Eurey and Sue Wilson
5. G.G. Gale, Jr.
6. Guadalupe Gonzales
7. Denise Ingledue
8. Dianne and Ken Joaquin
9. Monte B. Lloyd
10. Mark and Sylvia Mennel
11. Pauline I. Perry
12. Su and Jenny Yim

Based on the hearing request letters from those in Group C, OPIC infers that these are residential ratepayers to Bexar Met not in the business of development and new construction. Therefore, OPIC concludes that those in Group C are not subject to the impact fee and, therefore, not affected persons entitled to a contested case hearing. If Bexar Met were to represent otherwise, OPIC would reconsider its recommendation.

OPIC takes special note of G.G. Gale, Jr. In his hearing request, Mr. Gale states he is representing all residents in Timberwood Park and possibly all Waterwood residents, but he also indicates he is Vice President of Timberwood Development Company. He seems to indicate that his hearing request is based on his dissatisfaction as a ratepayer to the utility. In that capacity,



neither he nor anyone he represents would be an affected person for purposes of the impact fee hearing.

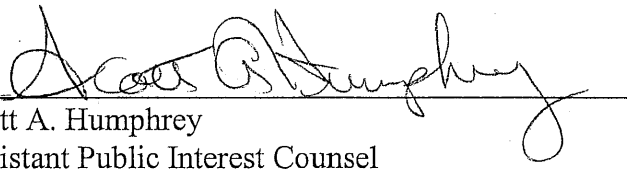
However, OPIC also notes he is the Vice President of Timberwood Development Company. It is possible that the development company is an affected person, and OPIC could possibly recommend granting a hearing request on behalf of Timberwood Development Company. Therefore, if Mr. Gale provides clarification that he is seeking a hearing on behalf of the development company, and if he provides additional information that the development company would be subject to the impact fee, OPIC would reconsider its recommendation. However, even with that information, it is unlikely OPIC would agree that Mr. Gale could represent the group of residential ratepayers.

#### **IV. Conclusion**

For the reasons set forth above, OPIC recommends that the Commission grant the hearing requests in Group A and denying the remaining hearing requests.

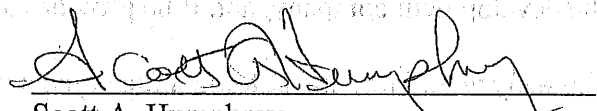
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of April, 2007, the original and eleven copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were served upon the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
Scott A. Humphrey

**MAILING LIST**  
**BEXAR METROPOLITAN WATER DISTRICT**  
**TCEQ DOCKET NO. 2006-1833-DIS**

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